No. 13,135

IN THE

United States Court of Appeals

For the Ninth Circuit

WATERMAN STEAMSHIP CORPORATION, a corporation,

Appellant,

vs.

SHIPOWNERS & MERCHANTS TOWBOAT CO., LTD., a corporation, and Tug SEA FOX, INC., a corporation, on their own behalf and on behalf of the Master, Officers and Crew of the Tug Sea Fox,

Appellees.

APPELLANT'S REPLY BRIEF.

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Subject Index

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PRELIMINARY STATEMENT.

Appellant's closing brief replies to the arguments advanced in appellee's brief in the same order in which the respective subjects are discussed in appellee's brief. Appellant's position was fully and fairly stated in its opening brief. With full realization of the gravity of its comment, appellant must state that this reply brief is made necessary solely by those misleading statements in appellee's brief which exceed the bounds of fair argument.

ARGUMENT.

I. THE TOWAGE ARRANGEMENTS DID NOT FREE THE TUG OR ITS OWNERS FROM RESPONSIBILITY FOR THEIR FAULT.

1. The negligence clause in the towage contract was void.

Appellee continues to urge that the exemption from liability for negligence clause, appearing in the towage contract, is valid, and in support of its contention cites two cases which do not involve the relation of tug and tow (*New Haven Trap Rock Co. v. U. S.,* 15 Fed. Supp. 619 and *Berwind-White Co. v. U. S.,* 15 Fed. (2d) 366) and asserts a possible ambiguity in the language used by the Supreme Court in holding such a clause ineffective in *The Wash Gray,* 277 U.S. 66, 72 L.Ed. 787. The appellee apparently obtains solace from the fact that the Supreme Court, six years before its decision in *The Wash Gray,* supra, found it unnecessary to consider the legal effectiveness of such a clause in its decision in *British Columbia Mills v. Mylroie,* 259 U.S. 1, 66 L.Ed. 807.

Authorities generally consider that the decision of the Supreme Court in *The Wash Gray,* supra, settles the law that such clauses are not valid (*Robinson on Admiralty,* p. 672).

Appellee wholly ignores that the law in this Circuit is clearly settled that such clauses are invalid as between tug and tow. *Mylroie v. British Columbia Mills,* 268 Fed. 449 (9th Cir.), *Sacramento v. Salz,* 3 F. (2d) 759 (9th Cir.).

In all events, appellee wholly ignores the fact that one of the primary items of fault which appellant Waterman charges against appellee shipowners and

the tug SEA FOX was the statutory fault of appellee in furnishing an incompetently manned tug with an unqualified and incompetent master. Such faults, as well as the faults in navigation and management charged by appellant and which are reasonably related thereto, constitute unseaworthiness within the owner's privity and knowledge and in the performance of a personal contract of the appellee tug owner, as to which no such purported exoneration from liability for negligence could, under any circumstances, be valid.

British Columbia Mills v. Mylroie, supra.

2. Appellant Waterman's insurance arrangements were not made in privity with appellee, were not disclosed to appellee and have no bearing on any proper issue in the case.

Appellee discusses the insurance arrangements made by Waterman on pages 4 through 12 of appellee's brief.

It is possible that the insurance arrangements made on the vessel by Waterman for appellant Waterman's own benefit were a factor which might properly be considered by the trial Court with regard to the issue of valuation of the HERALD OF THE MORNING. The valuation of the HERALD is not in issue on this appeal. The repeated references which appellee Shipowners makes to the insurance carried by Waterman on the HERALD are no more proper in this appeal than they would be in a personal injury action. Particularly objectionable is the comment appearing on page 10 of appellee's brief "Thus appellant's explanation * * * is an admission that underwriters, not

Waterman, are defending this case and will have to pay the salvage award to libelant".

We regret that appellee's tactics make it necessary to mention that Waterman's underwriters are not a party to this proceeding and we are confident this Court will realize that if we were as uninhibited as appellee in our references to insurance, we could and would advance arguments which would carry equally specious conviction against the propriety of allowing any salvage award to the owner of the tug and similarly for all other issues in this appeal.

We frankly admit that if Waterman had made *any* representation or undertaking vis-a-vis appellee Shipowners with respect to securing insurance for Shipowners, an inquiry into the nature of the insurance arrangements Waterman had in fact made might possibly be proper as an inquiry into possible corroboratory evidentiary matter. In this case there were no dealings whatsoever between Waterman and appellee Shipowners with respect to insurance and as a matter of fact, no claim is made by appellee Shipowners that it had any dealings with Waterman respecting insurance. *There is no claim by appellee Shipowners that Waterman made any agreement with it concerning insurance.*

The insurance on the HERALD, if any, is a private contract between Waterman and its underwriters in which appellee Shipowners does not have even a proper academic interest. Butler v. Boston S. S. Co., 130 U.S. 527, 32 L.Ed. 1017. It is regrettable that

the nature of appellee's presentation makes necessary the repetition of such elementary principles.

It is also regrettable that the nature of appellee's presentation makes necessary the repetitious statement that the insurance arrangements on the HERALD were between Waterman and Waterman's underwriters and for Waterman's benefit. Such arrangements were not between Waterman's underwriters and appellee Shipowners. They were not between Waterman and appellee Shipowners. They were not for the benefit of appellee Shipowners.

Appellee Shipowners makes much of the fact that the policy on the HERALD was endorsed with a rider which called for an additional one-eighth of one per cent premium and carried the notation "towing tug and/or tugs released of liability". The intended effect of such a clause was that Waterman's interest should be protected even if the arrangements made by Everett-Pacific with appellee Shipowners should result in the release of the tug from liability. The inclusion of such a rider in the policy did not under any possible construction or interpretation constitute a "to whom it may concern" warranty by Waterman that it would not look to appellee Shipowners for recourse for damages suffered by reason of Shipowners' negligence.

It is conceivably possible that the contracting parties in the towage agreement (Everett Pacific and appellee Shipowners) might have made arrangements which would have effectively relieved Shipowners from liability for some forms of negligence for ex-

ample, expressly naming Shipowners as an assured in the policy. The arrangements which were in fact made did not have that effect. The fact that Waterman had a clause added to Waterman's insurance cannot avail appellee Shipowners.

In an insurance policy, a waiver of a warranty of seaworthiness is not an admission of unseaworthiness as to third parties and likewise in a policy of insurance an agreement between the parties to the contract of insurance that it shall be valid even if a tug shall be released from liability for its negligence is, as to the third party tug, no admission of such release from liability and cannot under any conceivable theory estop the assured from asserting the absence of any such release.

On pages 7, 8 and 11 of its brief, appellee has referred to a waiver of subrogation in the policy between Waterman and Waterman's underwriters. We repeat that Waterman is the sole party in this case and that this is not a subrogation case. Such statements are wholly without support in the record. We particularly refer to the comment on page 11 of appellee's brief that the "insurers * * * waived subrogation in writing on the policy". This statement, if not a plain untruth, grossly exceeds the bounds of fair argument.

We unfortunately also find it necessary to mention the misleading nature of the penultimate paragraph appearing on page five of appellee's brief. This paragraph, as appears from its reference, is based on a telegram sent by Sudden & Christenson to Everett

Pacific and appearing on page 284 of the Apostles on Appeal. Appellee's phrasing would make it appear (1) that Sudden & Christenson did the acts therein mentioned in its capacity as agent for Waterman and (2) was directly prompted to do such acts at the instance of Waterman and (3) that the representations therein as to the "standard form towage contract" were representations of the belief of Waterman, all of which connotations and inferences are wholly without support in the record.

The italicized portion of the following statement appearing on pages 10 and 11 of appellee's brief is wholly without support in the record (cf. p. 284, Apostles on Appeal): "2. Waterman requested copies of the towing contract, so that it could arrange for insurance, *stating that it was understood the standard towing contract provided for release of tug*".

Particularly in view of our belief that this entire discussion of the insurance arrangements is wholly irrelevant in the case, we regret the rather extended discussion that has been made necessary. Other portions of this section of appellee's brief are misleading and not supported by the record, in particular the italicized portion of paragraph numbered 3 appearing on page 8 of appellee's brief and paragraph numbered (a) appearing on page 11 of appellee's brief (cf. p. 384 Apostles on Appeal).

II. THE STATUTORY FAULT OF RESPONDENT AND THE TUG SEA FOX AND THE NEGLIGENCE OF THE TUG SEA FOX.

1. R. T. Sommer was not licensed as required by statute and there is no evidence that he was in fact qualified.

The corresponding portion of appellee's brief is a masterpiece of obfuscation, feint and diversionary maneuver.

On pages 12 through 17 of its brief, appellee in a vigorous blunderbuss defense, asserts (1) that the SEA FOX did not require a licensed master since it was a seagoing *motor* vessel of less than 300 gross tons, (2) that if the SEA FOX did require a master possessing a certificate of competency under the requirements of The Conventions for Minimum Professional Requirements then the master's license which Captain Sommer held for San Francisco Bay satisfied the requirements, and (3) that in any event in obtaining his limited inland license, Mr. Sommer had been required to prove to the Coast Guard compliance with all requirements and qualifications required for the master's offshore certificate of competence under the Convention with the exception of proving competence in celestial navigation. It is apparently appellee Shipowners' endeavor to lead this Court to believe that the statutory fault of appellee and of Mr. Sommer was *de minimis* and of so technical and unsubstantial a nature as to be disregarded. The manner of appellee's presentation makes necessary a more detailed analysis of this portion of its brief than the merit of its argument justifies.

On page 12 of its brief, appellee states:

> "Section 224(a) of 46 U.S. Code, subsec. 3, provides that *any* license issued to a master *shall be*

deemed a certificate of competency within the requirement of the convention."

This is a misstatement of the substance of the statutory provision. 46 *U. S. Code,* 224a (3) in fact provides:

> "(3) Any license issued (whether before, or on, or after, October 29, 1939) to a master, mate, chief engineer, or assistant engineer *of a vessel to which this section applies* shall be deemed to be a certificate of competency for a master or skipper, navigating officer in charge of a watch, chief engineer, or engineer in charge of a watch, respectively," (emphasis supplied).

The section in question, 46 U.S.C.A. 224a, applies to vessels "navigating on the high seas" as appears from 46 U.S.C.A. 224a (1) with certain specified exemptions which are not here relevant, such as ships of war, government vessels, dhows and junks. A license issued to Mr. Sommer to act as master on a ship navigating San Francisco Bay and tributaries is by no stretch of the imagination a license issued Mr. Sommer for navigating a vessel on the high seas. The apparent and sole purpose of the provisions of 46 U.S.C.A. 224a (3) is to make it clear that for all purposes under the Convention an unlimited (high seas) license issued by the Coast Guard should serve as a certificate of competency under the Convention. This subsection makes it unnecessary for a qualified mariner holding an unlimited license to carry a separate piece of paper specially designated a "certificate of competence". It does not excuse a person holding an *inland waters* license from the necessity

of securing a certificate of competency before navigating on the *high seas.*

The SEA FOX is a motor vessel of 282 gross tons and as such is an "uninspected vessel" for the purposes of the U. S. Coast Guard Inspection Laws and Regulations. This is freely admitted.

Appellee, however, quotes a *portion* of that Coast Guard Regulation (46 C.F.R. 62.19) (Appellee's Brief p. 13) which affirmatively states the requirement that "inspected vessels" be manned by licensed officers. The substance of appellee's argument is that the SEA FOX was an "uninspected vessel" *ergo* the licensing requirements for inspected vessels do not apply to it *ergo* appellee and the SEA FOX might properly ignore any laws, treaties or regulations pertaining to "uninspected vessels".

At the time in question the SEA FOX was admittedly a vessel of more than 200 gross tons navigating on the high seas. As such it was clearly subject to the Convention (1938 A.M.C. 1284) and the enabling and penal statute 46 U.S.C. 224a. The Coast Guard regulations expressly extend all statutes relating to the licensing of officers for "inspected vessels" to "uninspected vessels" subject to the Convention. The regulation which so extends the statutory provisions is 46 C.F.R. 10.15-1.

Appellee argues that even if the failure of Mr. Sommer to have a proper license was a statutory fault still the fault was unsubstantial and purely technical since (1) Mr. Reichel, the mate of the SEA FOX held a master's license and since (2) in any

event to have secured his San Francisco Bay license Mr. Sommer had proved to the Coast Guard that he had all of the qualifications necessary for a high seas license save competence in celestial navigation.

Appellee's first point is wholly without merit. Mr. Sommer was the master of the SEA FOX and acted as such throughout the voyage in question. It was Mr. Sommer's judgment and Mr. Sommer's orders that controlled the conduct of the SEA FOX.

It also must be noted that the SEA FOX carried only three deck officers including Mr. Sommer and it was necessary for each of them to stand a watch, and each of the three including Mr. Sommer in fact stood a watch (Apostles p. 298). Thus the SEA FOX was not only without a properly qualified master but for eight hours out of every 24 the deck officer on watch was unqualified and acting in violation of the Convention and of 46 U.S.C. 224a.

With regard to its second point appellee states "Thus the only thing which can be said of Capt. Sommer's lack of an offshore license is that he had never passed an examination on celestial navigation." (Appellee's Brief p. 15.) This is a bald misstatement.

On page 14 of its brief appellee has listed the subjects required for the examination which Mr. Sommer passed in obtaining his San Francisco Bay license. The subjects upon which he would be examined for a master's competency certificate for an uninspected vessel under the Convention are listed in 46 C.F.R. 10.15-31. Entirely disregarding items

related to navigation, among the subjects specifically mentioned as required for the high seas certificate which are not specifically mentioned as required for the inland license are:

Meteorology, use and reading of weather bulletins;

Keeping a ship's head to sea in heavy weather with engines broken down;

How to rig a jury rudder;

Action to be taken in the event of springing a leak;

Cast of lead in heavy weather.

In addition the candidate for a master's certificate under the Convention must have served at least one year as a licensed mate (46 C.F.R. 10.15-29) which presupposes that the candidate has demonstrated proficiency in the following subjects (46 C.F.R. 10.15-31) upon which Mr. Sommer need never have been examined to secure his San Francisco Bay license (cf. 46 C.F.R. 10.05-15, 59):

The use and construction of a sea anchor;

The use and reading of the aneroid barometer;

Handling of a vessel's boat in heavy weather;

Distress signals and use of line throwing apparatus.

It is quite possible and even likely that the absence of that knowledge and skill which Mr. Sommer would have been required to have to enable him to obtain a license under the Convention, but which he did not

require for his San Francisco Bay license contributed to the hazard of the HERALD. Possibly of particular significance is the requirement that for a license under the Convention a master be able to understand weather bulletins including those phrased in semi-technical language such as warned of the approaching storm which are set forth on pages 18 and 19 of appellant's opening brief.

Of great interest is the difference in the experience required for a master's license under the Convention and a master's license for San Francisco Bay.

For a master's license for San Francisco Bay (46 C.F.R. 10.05-15) it was necessary that Mr. Sommer have experience on vessels on "bays, sounds, and lakes other than the Great Lakes".

For a master's license under the Convention (46 C.F.R. 10.15-29) it would have been necessary that Mr. Sommer have served 4 years *at sea* of which 1 year must have been as a licensed mate, or equivalent.

With regard to his actual experience Mr. Sommer testified in response to questions by the Court (Apostles pp. 231-232):

"Q. What is your business or occupation?
A. Captain of a tug, the tug Sea Fox.
Q. How long have you been on the Sea Fox?
A. About six years.
Q. And where? Did you have any regular run?
A. No, just towing around the Bay."

To round out the summary of Mr. Sommer's experience it is necessary only to refer to Appendix C to

appellant's opening brief to note the quiet times of the year in which Mr. Sommer acquired the "sea" experience which appellee argues fully qualified him to serve as a master for a voyage on the high seas in the stormy month of November.

2. The negligence of appellee and of the tug SEA FOX.

In its discussion of the rule of *The Pennsylvania,* 86 U.S. 125, 22 L.Ed. 148 at pages 17-18 of its brief appellee states that the rule comes into play only after negligence has been proved. If appellee were correct in this view the rule would be utterly meaningless. The Pennsylvania rule comes into play immediately the statutory fault or violation is shown. The violation of statute is in itself negligence and once the statutory violation is proved the only question remaining is whether the particular statutory violation *could* have been a contributing cause to the casualty.

In the present case it would of course be impossible for appellant to prove that the HERALD would not have encountered difficulty if the SEA FOX had had a legally qualified master just as in the *Denali,* 112 F. (2d) 952 it would have been impossible for the damage claimants to have proved that the vessel would not have stranded if the vessel had observed the Watches at Sea Act. It is seldom possible to prove a negative. Such is in the essence of the reason for the rule and the reason for the application of the rule is peculiarly appropriate in this case.

The HERALD was a dead ship completely in the charge of and under the control of the SEA FOX.

Acts in the management of the towing gear were performed aboard the SEA FOX by its crew all of whom are libelants in the present case. The master of the SEA FOX did not have those qualifications which the law required of him, and of appellee as a minimum. As a consequence the SEA FOX was unseaworthy in its most important single aspect. The same failure was flagrant negligence on the part of appellee. In the nature of the case and the voyage and as the record reveals and our opening brief points out the appellee is wholly unable to prove that the lack of qualifications of the master could not have contributed to the peril of the HERALD.

The specific instances which we have mentioned, e.g. the SEA FOX'S failure to replace her "insurance wire", her failure to repair her towing engine, her inexcusable and unexplained delay in calling for assistance after storm warnings and after the breakdown of her towing engine, etc., are each items of negligence and fault requiring that salvage be denied to the SEA FOX and that appellant receive judgment on its cross-libel.

In addition each of such instances of negligence represent situations in which a properly qualified and prudent tug master appreciating the probability of heavy weather would have made a different decision better designed to protect the HERALD. In other words each of such specific items of negligence represents an affirmative showing by appellant Waterman that the lack of a qualified master did in fact contribute to the HERALD'S peril.

Under the law, however, it is appellee's burden to prove that no such situations arose or existed. There may be other similar situations which arose and of which, because of the nature of the operation, appellant Waterman is unaware and it is appellee's burden to have proved, which it has not, that there were no such other situations. Appellant Waterman has proved statutory fault and in addition has proved affirmatively several specific items of negligence. On the record appellant Waterman has proved far more than it was necessary for it to prove to require a judgment in its favor both on appellee's salvage claim and on Waterman's cross-libel.

We have in appellant's opening brief fully shown that the specific items of negligence were both negligent and contributorily related to the peril of the HERALD. We therefore reply with great brevity.

a. The lack of an insurance wire.

It clearly appears from libelant's own testimony that the short 600 foot spare cable that the SEA FOX carried would not have been usable or satisfactory for assisting the HERALD in any of the conditions that prevailed. Mr. Reichel, the mate of the SEA FOX testified (Apostles pp. 154-155) that normally a 1200-foot towing wire was used, that approximately 200 feet of this length was required to secure the wire to the towing drum, that 1000 feet was used over the stern of the tug to the tow and that if a shorter wire were used there would be danger of it breaking. In the conditions that prevailed when the SEA FOX had an opportunity to

give the HERALD another wire after the SEA FOX'S towing engine broke it probably would have been necessary to secure the wire to the HERALD'S bitts rather than her anchor chain thus further shortening the length of wire effectively available. It is clear from the record that a 1200-foot spare wire could and should have been used but that the 600-foot "spare" was useful only as ballast for the SEA FOX.

Appellees seek to avoid the consequences of their failure to provide a proper spare towing wire by claiming that it would have added nothing since the NEPTUNE was on the scene before the SEA FOX towing wire broke.

The critical period, however, commences with the weather report of 0830 the morning of November 13th (Appellant's Opening Brief p. 19) and not later than midnight of November 13th by which time the towing engine of the SEA FOX was out of commission. The SEA FOX, however, did nothing to protect the HERALD until late in the afternoon of the following day when it radioed for assistance. The towing engine of the SEA FOX broke on November 13th but the towing wire did not break until November 16th. During this period of more than two days the weather afforded opportunities for the SEA FOX to have given the HERALD an additional wire if she had had one—and prior to the arrival of the NEPTUNE.

b. The delay in calling for help.

The period from 0830 on November 13th when notice of impending heavy weather was given until 1620 on November 14th when the SEA FOX radioed for help and during which the SEA FOX did nothing to secure the safety of the HERALD is pertinent not only with regard to the lack of a proper spare towing cable but also in respect to the delay in securing help and the failure to seek a port of refuge. A qualified master with sea experience would have sought assistance as soon as there was a forecast of weather that his immediately previous experience had taught him was beyond the capacity of his vessel. With timely assistance called for in time it is probable that the HERALD could have reached a port of refuge and have avoided the peril which gave rise to the judgment for $20,250.00 plus interest and costs which Waterman was required to pay to the NEPTUNE and HERCULES interests for resulting salvage services as well as the other damage suffered by the HERALD. To prevail appellee must prove the contrary and appellee has no proof to the contrary.

c. The fairlead traveller.

The appellee attempts to excuse the negligence of the SEA FOX in leaving Drake's Bay on November 8th without repairing the fairlead traveller by claiming that the traveller would not have been used after the 8th and could not have been used after the gears stripped on the 14th (13th?). Appellee's argument is based on its demonstration that the fairlead traveller

is used when line is heaved in, not when it is let out. It appears from appellee's own testimony (Apostles p. 192) that the towing winch of the SEA FOX was intended for letting out and heaving in line. On the SEA FOX this had to be done by manually operated controls unlike automatic towing winches which automatically take in or let out line as strain decreases or increases. From the record it may fairly be assumed that a carefully and competently handled tug encountering heavy weather would attempt to minimize the strain on its towing winch and on the towing cable by slacking off wire at moments of greatest strain and then heaving the wire in when the strain decreased, just as would a fisherman in playing anything from a trout to a tarpon. But the SEA FOX had no fairlead traveller. She could not heave in. She required some 200 feet of the wire on her drum to anchor the wire and she did not dare to let the wire out in moments of great strain because every foot of wire that would be let out would be gone beyond recall. The result was a geometrically increased strain on the gears which finally gave way, undoubtedly as a direct result. Appellee has not shown the contrary. Appellee has not shown that a properly qualified master with sea experience would have gone to sea with only half of a towing winch.

III. THE APPELLEE'S CLAIM FOR SALVAGE IS BARRED BY ITS CONTRACT AS WELL AS ITS NEGLIGENCE. CLAIM OF CREW OF SEA FOX AS DISTINGUISHED FROM OWNER AND MASTER.

1. Contract.

Nowhere in its brief does appellee deny that the weather encountered by the HERALD was unforseeable. Appellee's entire argument is that a tug may claim salvage from its tow if difficulty is encountered because of heavy weather even though the heavy weather was foreseeable. By inference in its brief appellee admits what the record clearly proves, i.e. that the weather encountered by the HERALD on the voyage in question was not unusual for the season and was foreseeable.

Such being the case the appellee can find no case to support its claim that the services performed by the SEA FOX were not covered by the towage contract.

In a recent English case in the Admiralty Division decided December 17, 1951, the Slaney (1951), 2 Lloyd's Rep. 538 in which a tug, using the same arguments advanced by appellee herein, claimed salvage because in towing a dead ship the wind increased to gale force and caused considerable difficulty including the stranding of a tow cable. The Court, Lord Merriman, P., of course denied the claim for salvage saying:

> "* * * I am asked nevertheless to consider that this case comes within the proposition stated by the late Mr. Justice Hill in the *Homewood* (1928) 31 Ll. L. Rep. 336 at P. 339 in these words:

"'To constitute a salvage service by a tug under contract to tow two elements are necessary: (1) that the tow is in danger by reason of circumstances which could not reasonably have been contemplated by the parties; and (2) that risks are incurred or duties performed by the tug which could not reasonably be held to be within the scope of the contract.'

"In my opinion, neither the one proposition nor the other is within measurable distance of being satisfied. There was nothing in the deterioration of the weather that was not expected or to be expected at that time of the year, and there was no service or duty performed by the tug which could not reasonably be held to be within the scope of the contract. The very most which was said was that there was damage to one tow-rope which involved the replacement of a certain number of fathoms, and the chafing of another which involved a resplicing.

"In my opinion this case has some of the elements of a 'try-on'. I think it is a hopeless claim and that there are no elements of salvage present. It is all covered by the contract and I give judgment accordingly."

Merely to state the rule is to deny appellee's claim.

2. Claim of the crew of the SEA FOX as distinguished from the owner and master of the SEA FOX.

The appellee Shipowners is barred by its contract from salvage. Appellee Shipowners and the master of the SEA FOX are barred from salvage by their statutory fault and other items of negligence. A recent case would indicate that the innocent crew

might not be barred by the contract unless they had knowledge of its terms. The *Ionian Leader,* 100 Fed. Supp. 829. We express no view on this question since the authorities appear to leave the answer in doubt but if this Court should find that the innocent crew of the SEA FOX is not barred from some compensation of a salvage nature for their efforts in extricating the HERALD from the peril in which she had been placed by the negligence of appellee and Mr. Sommer, then that award to the crew must be reimbursed to Waterman by appellee Shipowners. Logically we see no reason that the innocent crew of the SEA FOX should be barred by the negligence and statutory fault of the owner and master of the SEA FOX. Factually, however, we find it difficult in the nature of the transaction to conceive that the crew did not realize that the SEA FOX had contracted to use its best efforts to tow the HERALD to Everett, Washington.

IV. THE AWARD TO THE SEA FOX WAS EXCESSIVE.

In its brief appellee apparently concedes (Appellee's brief p. 43) that any salvage award to which the SEA FOX might otherwise have been entitled (disregarding negligence) should have been reduced by reason of the tug's contractual obligation, but seeks to avoid the necessary effect of the concession by stating "We know of no place in the opinion below, or in the findings and conclusions, where the District Court held or intimated that it had failed or refused to take into consideration the contract obligation of the Sea

Fox." and "any 'allowance' for the Sea Fox's contractual obligation has already been made."

We refer briefly to the trial Court's memorandum opinion:

> "In view of all the evidence, therefore, the court estimates that the total salvage should be considered at the sum of $60,000.00, provided all the salvors who rendered service claimed and were entitled to claim pay for their services." (Apostles p. 46.)

and further

> "Accordingly, the Court holds that the facts in this case warrant allowing the Sea Fox to claim as a salvor. The only remaining question is whether her claim is barred because of fault or negligence." (Apostles p. 48.)

It is wholly clear from a reading of the memorandum opinion that the Court allowed the SEA FOX to participate without modification or deduction as a meritorious volunteer salvor. The remainder of the matter discussed in this section of appellee's brief is adequately covered in our opening brief.

The appellee makes much of the fact that Waterman paid to the Puget Sound interests an award which it admittedly considers excessive. Appellee argues from this that appellant does not in fact consider the award to the SEA FOX excessive. Nothing could be further from the fact. Appellant Waterman paid the Puget Sound interests for the account of appellee and is perfecting its claim for reimbursement in this proceeding. The present appellee was im-

pleaded in the *Puget Sound* case and had ample opportunity to defend the claims of the Puget Sound interests.

V. PUBLIC POLICY AND CONCLUSION.

Appellant pointed out in its opening brief that virtually all cases in which a tug has been permitted to claim salvage from its tow are cases in which there had been a failure of the *tow's* equipment. Appellee argues that this is mere happenstance. Nothing could be further from the truth. A tow, particularly a dead ship such as the HERALD is at the mercy of her tug and in normal course the owner of the tow has little if any means of knowing what occurs aboard the tug. The cases in their results and holdings, although not expressly stated in the opinions, recognize that no tug should ever receive from the Courts an incentive for negligence or incompetence. A tug should never receive a salvage bounty from her tow unless the facts giving rise to the salvage situation are so clearly divorced from the tug as by their very nature to preclude even the hint of a possibility that the tug is receiving a reward for failing to use her best efforts.

In this case the facts are quite otherwise. Disregarding appellant's other very substantial damages appellee has received a reward of $24,750 for entrusting the HERALD and her sixteen lives to an unsea-

worthy tug with an unqualified master. Nothing more need be said.

Dated, San Francisco, California,
March 10, 1952.

Respectfully submitted,
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